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No. 02-1466

In the Supreme Court of the United States

BERTRAND R. FAVREAU, II, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Petitioners were discharged from the military for failure to meet weight or fitness requirements for non-medical reasons after undergoing counseling and remedial weight reduction programs and being informed that such failure could result in discharge. The question presented is:

Whether the court of appeals erred in adopting the trial court's conclusion that the recoupment of the unearned portions of petitioners' enlistment or re-enlistment bonuses did not violate 37 U.S.C. 308 and 308a (Supp. V 1999), and implementing regulations, which require recoupment of unearned portions of bonuses paid to service members who "voluntarily" fail to complete their term of enlistment.

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OPINIONS BELOW

The decision of the court of appeals (Pet. App. 1a-3a) is reported at 317 F.3d 1346. The decision of the United States Court of Federal Claims (Pet. App. 4a-28a) is reported at 49 Fed. Cl. 635.

JURISDICTION

The judgment of the court of appeals was entered on December 30, 2002. The petition for a writ of certiorari was filed on March 28, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Enlisted members of the military services (the Army, Air Force, Navy and Marine Corps) may be paid bonuses upon enlistment or re-enlistment. The "bonus statutes" set forth at 37 U.S.C. 308 and 308a (Supp. V

1999) authorize the Services to recoup bonuses from members who fail to complete their entire enlistment or re-enlistment term.[1] The statutes provide that the government shall recoup the unearned portion of a service member's bonus—the portion associated with the part of the enlistment term the service member did not serve—when that member "voluntarily, or because of his misconduct, does not complete the term of enlistment for which a bonus was paid to him." 37 U.S.C. 308(d)(1), 308a(b). This case concerns the recoupment of bonuses where service members do not complete their term of enlistment because of failure to meet weight control or physical fitness standards.

The bonus statutes authorize the Secretary of Defense (Secretary) to issue implementing regulations. 37 U.S.C. 308, 308a(b). Acting under authority delegated by the Secretary, in 1983 Assistant Secretary of Defense Lawrence Korb promulgated a list of separation categories that would result in recoupment. The categories included in his directive, known as the "Korb memorandum," were: (1) Convenience of the Government (physical standards—overweight/obesity); (2) Unsatisfactory Performance; (3) Drug Abuse Rehabilitation Failure; and (4) Alcohol Abuse Rehabilitation Failure. For none of those separation categories was recoupment conditioned on a separation request by the service member. Pet. App. 11a-13a; C.A. App. 740-742.[2]

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[1] All references to Section 308a refer to 37 U.S.C. 308a (Supp. V 1999), which was repealed in 2000.

[2] Although the Korb memorandum was not promulgated through notice-and-comment rulemaking, it falls within the APA exception for "matters 'relating to agency management or personnel.'" Pet. App. 22a (quoting 5 U.S.C. 553(a)(2) (1994)). Petitioners do not contend otherwise.

The Korb memorandum was sent to the Military Pay and Allowance Committee (MPAC) for incorporation into paragraph 10942 of the Department of Defense (DoD) Pay Manual (DoDPM), which later became paragraph 090403 in the DoD Financial Management Regulations (FMR).[3] Thus FMR 090403 was intended to "incorporate[] the contents of" the Korb "memorandum of 13 April 1983." Pet. App. 15a. FMR 090403 provides in relevant part:

> *Reasons for Recoupment.* For purpose of recoupment of any unearned portions of enlistment or reenlistment bonuses, the term "who voluntarily or because of misconduct" includes (but is not limited to) members separated for the reasons listed below:
>
> * * *
>
> L. Unsatisfactory Performance.
>
> M. Drug and alcohol rehabilitation failure.
>
> * * *
>
> N. As directed by the Secretary of the Military Service concerned in individual cases. Includes * * * for the convenience of the Government upon the application and interest of the member because of special or unusual circumstances including, but not limited to, the following:
>
> 1. To permit attendance at a civilian school.
>
> * * *
>
> 4. Sole surviving family member.
>
> 5. Conscientious objection.

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[3] See C.A. App. 1427-1429 (DoDPM 10942 change dated Feb. 15, 1984, pre-incorporation); *id.* at 1430-1432 (DoDPM 10942 change dated Apr. 4, 1984, post-incorporation); *id.* at 618-620 (FMR 090403, 1999 version).

> 6. Overweight/obesity or lack of physical fitness.
>
> * * *

Pet. App. 29a-30a; C.A. App. 618-620.[4]

For most "convenience of the Government" separations—such as those relating to a service member's decision to attend a civilian school, or the service member becoming the sole surviving family member—military regulations permitted service members to "apply[] for" or show an "interest in" separation on that basis. Pet. App. 16a. "[D]uring the time weight control failure was processed for separation under the" category of "convenience for the government," however, "it was not possible for service members to apply or express their interest to initiate such a separation." *Id.* at 28a; see *id.* at 16a.

In March 1992, Assistant Secretary of Defense Christopher Jehn, also acting under authority delegated by the Secretary, created a new separation category called "Weight Control Failure," and he directed use of that category by all of the Services. Pet. App. 15a & n.14; C.A. App. 761. The pertinent directive, the "Jehn memorandum," provided explicit guidance regarding the way in which separations under the Weight Control Failure category would be treated for purposes of benefits: "This category is similar to existing categories of separation for Drug and Alcohol Abuse Rehabilitation Failure and will be treated similarly for benefit eligibility." Pet. App. 15a n.14; C.A. App. 761. Thus, as

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[4] No relevant differences exist between FMR 090403 and the current version of the regulation, FMR 090503. Pet. App. 29a-30a. As explained below, however, the Department of Defense has determined to revise the current regulation to eliminate any potential ambiguities. See p. 21, *infra*.

with separations under the Drug or Alcohol Rehabilitation Failure categories, the Services have consistently recouped under the Weight Control Failure category without regard to whether the service member initiated the process leading to discharge.

2. Petitioners are a class of former service members. Upon enlisting or re-enlisting, each received a monetary bonus that would serve as additional compensation to be earned on a pro-rata basis throughout the enlistment term. During the term of service, each failed to meet the weight or physical fitness standards of his or her Service. Each petitioner received dietary counseling and participated in remedial weight or fitness programs; each was warned that failure to meet Service standards might result in discharge; and each failed to comply with weight or fitness standards for non-medical reasons. Pet. App. 4a-5a. As a result, each petitioner was separated from military duty under one of the separation categories contained within the service separation regulation in effect at the time, including Unsatisfactory Performance, Convenience of the Government, and Weight Control Failure. *Id.* at 6a-7a, 26a. The one that applied to a given petitioner depended on the separation date and the Service involved.[5] After separation, the Services recouped the unearned portion of the bonus paid to each petitioner.

3. Petitioners brought suit in the United States District Court for the District of Maine, which transferred the case to the Court of Federal Claims (CFC or trial court). Petitioners alleged that the recoupment consti-

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[5] For the periods associated with each category, see C.A. App. 1309-1322, 1339-1340 (Unsatisfactory Performance); *id.* at 1323-1327 (Convenience of the Government); *id.* at 1318, 1321, 1328-1344 (Weight Control Failure); see also Pet. App. 7a nn.6-8.

tuted a breach of contract and violated the bonus statutes and implementing regulations. The CFC certified petitioners' suit as a class action, and granted the government's motion to dismiss petitioners' contract claims. Because the duty to pay bonuses arises from statute rather than contract, the court concluded that petitioners could not assert valid breach-of-contract claims. Pet. App. 17a-18a. Petitioners do not raise in this Court any issues arising from the breach-of-contract claims.

The government then filed a motion for summary judgment on petitioners' statutory and regulatory claims, which the CFC granted. The CFC first rejected petitioners' claim that the recoupments were not authorized by statute because the failure to complete a term of enlistment based on noncompliance with weight control or physical fitness standards is not "voluntary" within the meaning of 37 U.S.C. 308(d)(1), 308a(b). See Pet. App. 18a-20a. Applying the two step framework of *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the court held that the statutes are ambiguous and do not preclude the Services' construction because they do not define the phrase "voluntarily . . . does not complete the term of enlistment." Given that ambiguity, the court continued, the challenged recoupment did not violate the plain statutory text. Pet. App. 20a.[6]

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[6] The court explained that *Chevron* deference was particularly appropriate in this case because Congress provided an "explicit" delegation of "interpretive regulatory authority," Pet. App. 22a, and because the agency had consistently followed the policy at issue, *id.* at 23a. Although the Korb and Jehn memoranda were not subject to notice-and-comment, the court explained, they fell within the exception for "matters 'relating to agency management

After examining the FMRs, the directives issued by Assistant Secretaries Korb and Jehn, DoD's consistent recoupment practices, and the legislative history of Sections 308(d)(1), 308a(b), the court concluded that DoD's recoupment policies represent a permissible implementation of the statute. Pet. App. 21a-27a. For years, DoD had construed the phrase "voluntarily does not complete the term of enlistment" to encompass cases where the service member engages in voluntary conduct that the service member knows will lead to separation. "DoD's interpretation of the statutory provisions to permit recoupment when service members failed weight or physical fitness standards," the court held, "was reasonable." *Id.* at 28a; see *id.* at 24a-25a.

That construction, the court pointed out, was also consistent with the "small amount of legislative history on point," which stated that recoupment of unearned bonus money is permissible "when separation prior to completion of enlistment takes place if such separation is not due to *physical disability incurred in the line of duty* or otherwise occasioned by circumstances *beyond the control of the individual.*" Pet. App. 23a-24a (quoting S. Rep. No. 935, 82d Cong., 1st Sess. 3 (1951)). The court explained that, contrary to petitioners' arguments, neither the statute nor common sense suggested that the Services "had to treat failure to satisfy weight and fitness standards as non-volitional, or that [they] had to impose a requirement that the subsequent separation be at the service member's request." *Id.* at 25a.

The trial court also rejected petitioners' claim that, under the recoupment regulations, service members could be discharged for failure to meet weight or fitness

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or personnel,'" and "bound all the services to a single practice." *Id.* at 22a.

standards only "for the convenience of the government" pursuant to subdivision N of para. 090403 (see p. 3, *supra*), and then only when the separation occurred "upon the application and interest" of the service member. Pet. App 29a-30a. The court held that service members "failing weight or fitness standards" can be separated based on categories "other than 'convenience of the government,'" such as "unsatisfactory performance" or (when it was later added) "weight control failure." *Id.* at 26a. The "references to '[o]verweight/obesity' or 'lack of physical fitness' in subdivision N," the court explained, "are examples of circumstances in which the service may have discharged someone for its own convenience. They cannot reasonably be construed to bar recoupment when the separation is characterized in some other way." *Ibid.* The court also explained that FMR 090403 does not make the categories it described exclusive, and that the "Jehn memorandum" of 1992 had created "a separation category called weight control failure" that was to be treated "as equivalent to drug rehabilitation failure for recoupment purposes." *Ibid.* The Jehn memorandum, the court explained, is mandatory, "controlling," and "entitled to the force and effect of law." *Id.* at 26a-27a & n.24.

Finally, the court rejected the argument that, with respect to "convenience of the Government" terminations for obesity and noncompliance with physical fitness standards, recoupment is improper unless the service member applied for or expressed interest in separating on that ground. Pet. App. 27a (The government stopped making "convenience" terminations in weight or physical fitness cases in 1992, after the Jehn memorandum was issued.). The court explained that the phrase "application and interest" in FMR 090403 applies to other convenience of the government cate-

gories (*e.g.*, sole surviving son or daughter, early release for further education) but not weight control failure or lack of physical fitness. The contrary construction, the court explained, would be "anomalous in that, during the time weight control failure was processed for separation under the 'convenience of the government' rubric, it was not possible for service members to apply or express their interest to initiate such a separation." *Id.* at 27a-28a. "The 'application and interest' language," the court therefore concluded, "merely describes those circumstances where a service member can apply for separation under the category 'for convenience of the government.' It was not intended to nor could it have imposed an additional element of a separation for convenience." *Id.* at 28a.

4. The Federal Circuit affirmed in a *per curiam* opinion "[f]or the reasons well stated in" the trial court's opinion. Pet. App. 3a. Adopting the trial court's decision, the court of appeals attached that opinion to its own. See *id.* at 1a-3a.

ARGUMENT

The decision of the Court of Federal Claims, adopted by the Federal Circuit, does not conflict with any decision of this Court or any other court of appeals. Accordingly, further review is unwarranted.

1. Petitioners first argue that they did not fail to complete their terms of enlistment "voluntarily," and that 37 U.S.C. 308(d)(1) and 308a(b) therefore preclude the military from recouping the unearned portion of their bonuses. In other words, they claim that, even though the conduct that led to their separations was volitional—and they knew it would cause them not to complete their term of enlistment—those provisions entitle them to retain the portion of their bonuses

corresponding to the part of the enlistment term they did not serve. See Pet. 11-12. That argument is incorrect.

a. The Department of Defense has long construed the word "voluntarily" in Section 308(d)(1) to encompass not only those cases where the service member tells the Service that he does not wish to complete his enlistment term, but also cases in which the service member engages in volitional conduct that he knows will lead to his separation and thus cause him not to complete his enlistment term. As the Court of Federal Claims explained:

> DoD thus interprets the term "voluntarily" to refer to whatever the service member did or did not do to prompt separation. So long as there is counseling and an opportunity to overcome deficiencies, and so long as persons with medically-diagnosed problems that interfere with weight reduction or maintaining physical fitness may not be separated for weight control failure or lack of physical fitness, the failure to meet standards is deemed volitional. The focus is thus not on the characterization of the separation itself but on the service member's actions or inactions leading to separation.

Pet. App. 10a. The court summarized: "What the government contends is that, because the underlying reasons prompting separation relate to acts of volition and because these actions were known by the service members to lead to separation, the early termination of the enlistment is also voluntary." *Id.* at 20a.

Both the Court of Federal Claims and the Federal Circuit properly concluded that DoD's longstanding construction is a permissible interpretation of an ambiguous statute. Pet. App. 3a, 20a, 28a. There is no rea-

son why a service member who willfully engages in conduct (or refrains from conduct) *knowing* that it will result in his separation from the Service—*i.e.*, that it inevitably will prevent him from completing his enlistment term—does not "voluntarily" fail "to complete the term of enlistment." And there is no reason why a service member who engages in volitional conduct knowing that it will result in his discharge should necessarily be treated differently (much less better) than one who merely requests a discharge. The voluntary failure to fulfill a known condition precedent to completing a term of enlistment is a voluntary failure to complete that term. As the trial court concluded:

> To strike down DoD's interpretation in this circumstance would require us to hold as a matter of law, either that the agency had to treat failure to satisfy weight and fitness standards as non-volitional, or that it had to impose a requirement that the subsequent separation be at the service member's request. Neither holding is dictated by the statutory language or by reason.

Id. at 24a-25a.

The DoD's longstanding construction is supported by the statute's legislative history as well. As the district court observed, the Senate Report accompanying the bill that added recoupment to the bonus statutes described the bill as providing "for the recoupment of unearned bonus money when separation prior to completion of enlistment takes place if such separation is not due to *physical disability incurred in the line of duty* or otherwise occasioned by circumstances *beyond*

the control of the individual." Pet. App. 23a-24a (quoting S. Rep. No. 935, 82d Cong., 1st Sess. 3 (1951)).[7]

b. Petitioners likewise err in asserting (Pet. 12-13) that the decision below conflicts with *Iliff* v. *Schlesinger*, 539 F.2d 1275 (10th Cir. 1976), a two-page court of appeals decision issued almost three decades ago. *Iliff* merely held that a request to be discharged is *sufficient* to render the discharge voluntary, even if the court cannot determine whether the factors that led the service member to make the request were voluntary. *Iliff* does not address whether a request for separation is *necessary*. Nor, for that matter, does it address what constitutes voluntary action in the absence of a request for discharge.

In *Iliff*, the service member requested separation on the ground that he was a conscientious objector. The Tenth Circuit upheld the challenged recoupment of his bonus under 37 U.S.C. 308, concluding that assertion of

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[7] Petitioners similarly err in contending that the Department of Defense's construction renders the category of "misconduct" superfluous. Pet. 11. Voluntary action that leads to discharge does not necessarily constitute "misconduct," and Congress presumably did not wish to require the military services to impose the stigma of the "misconduct" label on every officer who engages in volitional conduct knowing it will result in discharge. In that respect, petitioners' challenge (while consistent with their financial interests) is contrary to the long-term interests of most service members. If failure to meet weight control standards for non-medical reasons were not categorized as voluntary conduct, it would likely be categorized as misconduct, imposing the unnecessary stigma of a "misconduct" termination on service members who fail to control their weight. Thus, having benefitted from the military's decision not to stigmatize them with the "misconduct" label, petitioners now seek a financial reward—the right to keep a bonus for the portion of the enlistment term they never served—as well.

conscientious objector status did not preclude recoupment. See 539 F.2d at 1276. The court acknowledged that application of the statutory term "voluntary" to conscientious objectors "contains some abstrusity." *Ibid.* Nonetheless, it explained:

> [We are] certain * * * that Congress had no intent to project upon the military or the courts the age-old controversy of whether human actions dictated by sincere faith or the mandates of a subjective conscience constitute voluntary or involuntary actions. In terms of the ordinary meaning of "voluntary," the compulsion of conscience motivating an objector cannot be distinguished, for example, from the subjective decision of one who seeks discharge to ease familial or economic hardship occasioned by a father's death.

Ibid. The court thus held that, where a service member asks to be discharged, "the compulsion of conscience motivating an objector" to make the request does not require that he be treated differently under the recoupment statute than other service members making discharge requests for other reasons. *Ibid.*[8]

Petitioners thus overread *Illif* when they argue that it "rejected a reading of the recoupment statutes under which the determination of 'voluntariness' turned on the volitional nature of the service member's action," and instead "adopted [the] clear and simple reading" that "[a] member 'voluntarily' does not complete his or

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[8] Indeed, the Tenth Circuit's conclusion that a request for discharge is sufficient to render voluntary the failure to complete an enlistment term makes particular sense as applied to the sole surviving family member criterion, as that status is not produced by voluntary action, but the decision whether to make a request for discharge clearly is a voluntary choice.

her term of enlistment *when he or she asks to be discharged.*" Pet. 12-13. *Iliff* instead held that a voluntary request for separation is *sufficient* to render the failure to complete the enlistment term voluntary. It had no occasion to determine—and did not determine—whether such a request is *necessary*. Nor, for that matter, did it explore the possibility of voluntary failure to complete an enlistment term in the absence of such a request. Thus, notwithstanding the trial court's passing assertion of "disagree[ment] with" *Illiff*, Pet. App. 19a-20a n.18, the decision in this case is not inconsistent with *Illiff*'s holding (that a request for separation is sufficient to render the failure to complete a term of enlistment voluntary), and there is no conflict warranting this Court's review.[9]

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[9] Petitioners also assert (Pet. 13-14) that the decision in this case conflicts with *Hensala* v. *Department of the Air Force*, 148 F. Supp. 2d 988 (N.D. Cal. 2001), and *United States* v. *Gears*, 835 F. Supp. 1093 (N.D. Ind. 1993), which involved recoupment of education payments under 10 U.S.C. 2005(a). Those district court decisions have no precedential effect, and thus establish no conflict warranting review by this Court. See Sup. Ct. R. 10. Nor does the sparse district court authority invoked by petitioners "show a need for direction from this Court." Pet. 14. Besides, *Gears* does not conflict with the instant decision. Central to the district court's decision to reject recoupment for failure to meet weight standards in that case was its finding that "nothing in the record indicates that Mr. Gears knew that his weight threatened his active service as well as his commission." 835 F. Supp. at 1099. Here, by contrast, the trial court found that petitioners were not "separated until they had * * * been warned that failure to meet standards might result in discharge." Pet. App. 5a. Yet petitioners continued in their failure to meet those standards nonetheless. See *id.* at 25a n.22 (discussing *Hensala* and *Gears*); contrast *Scott* v. *Lehman*, Civ. No. 2:86-0734-1 (D.S.C. June 23, 1987) (reproduced in C.A. App. 623-640) (holding that service member's failure to complete his enlistment term was voluntary under bonus statutes

2. Alternatively, petitioners rely on the Department of Defense's regulations, arguing that the trial court impermissibly gave priority to "ambiguous, unpublished memoranda" over those published regulations. See Pet. 15-18. According to petitioners, FMR 090403 permitted "bonus recoupment for a weight or fitness separation only when the separation results from the *application* of the service member." Pet. 16. That argument too lacks merit, and raises no issue warranting further review.

As an initial matter, both the trial court and court of appeals agreed that the regulation on which petitioners rely is ambiguous. Pet. App. 20a (FMR "insufficient to understand the agency's interpretation"); *id.* at 28a (FMRs "confusing" and "leave something to be desired in terms of clarity"). Consequently, in construing the regulation, the courts consulted the directive that the regulations were meant to incorporate (the Korb memorandum), a later directive with the force and effect of law (the Jehn memorandum), and the agency's longstanding, consistent, and undisputed practice. See *id.* at 21a. When read together, those sources support the Services' contention that the regulations are best read as permitting recoupment where service members, like petitioners, are discharged under the Unsatisfactory Performance, Convenience of the Government (physical fitness or obesity), or Weight Control Failure categories.

Contrary to petitioners' submission, there is nothing exceptional about relying on such sources in construing

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because he was repeatedly counseled about his weight, was aware that his weight could result in separation, and suffered from no medical condition preventing him from meeting weight and fitness standards).

an ambiguous agency regulation. This Court has repeatedly recognized that an agency's interpretation of its *own regulation* is "controlling unless 'plainly erroneous or inconsistent with the regulation,'" *Auer* v. *Robbins*, 519 U.S. 452, 461 (1997), and has deferred to such interpretations even if expressed "in the form of a legal brief," so long as the interpretation reflects the agency's "fair and considered judgment on the matter," *id.* at 462 (citations omitted). See *Christensen* v. *Harris County*, 529 U.S. 576, 588-589 (2000) (noting that *Chevron* deference is owed to an agency regulation interpreting an ambiguous statute, and that *Auer* deference is owed to an agency's construction of an ambiguous agency regulation, but rejecting *Auer* deference because the regulation at issue there was not ambiguous).[10]

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[10] Petitioners likewise err in accusing (Pet. 18) the court of having accorded *Chevron* deference to the affidavits of DoD personnel charged with overseeing the recoupment process. See Pet. App. 11a, 21a. The court did not afford those sworn statements more importance than other sources. Instead, the court considered the affidavits after making the "critical" and undisputed findings that "the affidavits offered by defendant as evidence of agency practice are more than mere post-hoc rationalization"; that the DoD's actual recoupment practice "has not varied"; and that "[t]he practice explained in the affidavits is consistent with the regulations and statutes governing recoupment and the agency's interpretation of them." *Id.* at 23a; see also *id.* at 17a ("It is undisputed that the services have, without exception, applied the FMR in a manner consistent with the government's explanation."). Relying on such sources to determine an agency's longstanding practice when construing an ambiguous regulation is not impermissible under *Auer*.

Consequently, there is no merit to petitioners' claim (Pet. 18) that the lower courts viewed the affidavits as having the "effect of law" under *United States* v. *Mead Corp.*, 533 U.S. 218 (2001). Both courts properly considered the relevant directives and agency

Petitioners' contrary argument in any event proceeds from the regulation-specific premise that FMR 090403 unambiguously provides "that recoupment is permissible only when a service member is separated *on his own application* for obesity or lack of fitness." Pet. 15-16.[11] But the FMR is not unambiguous. FMR 090403M does mention separation "for the convenience of the government upon the application and interest of the member because of special or unusual circumstances including, but not limited to" the listed categories, such as the service member becoming the "[s]ole

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practice as evidence of the agency's construction of its regulations. The decision below, moreover, does not purport to issue a specific holding regarding the scope of (or place a particular gloss on) *Mead*, and thus does not bind future panels to any particular construction of that decision. In any event, petitioners' *Mead* argument is premised on the notion that the FMR is unambiguous and that the affidavits and the Jehn and Korb memoranda were introduced to "contradict" it. Pet. i; see Pet. 16 (interpretation "flatly inconsistent" with regulation). That claim does not present an open issue of law; *Christensen* v. *Harris County* makes it clear that courts ought not defer to an agency construction that contradicts a regulation's "obvious meaning." 529 U.S. at 588. Nor is the issue properly presented in this case, because the FMR on which petitioners rely was hardly unambiguous. See pp. 17-19, *infra*.

[11] We note that this argument does not apply to many members of the plaintiff class, such as those separated under the category of "Unsatisfactory Performance," FMR 090403K. For those plaintiffs, the Korb memorandum and FMR 090403 expressly require recoupment without making reference to an application for separation. Pet. App. 29a; C.A. App. 619. The reference to application or interest appears only in a phrase connected with—and thus creates ambiguity only with respect to service members separated under—the "for the convenience of the government" category found in FMR 090403M. Accordingly, any class members discharged for unsatisfactory performance have no basis to complain about recoupment actions in the absence of an application.

surviving family member," FMR 090403M.4, "[c]onscientious objection," FMR 090403M.5, and "[o]verweight/obesity or lack of physical fitness," FMR 090403M.6. However, as the trial court explained, "during the time weight control failure was processed for separation under the" category of "convenience of the government, * * * it was not possible for service members to apply or express their interest to initiate such a separation." Pet. App. 27a-28a. Unlike the regulations for "other convenience separations," the "regulations made no provision for members 'applying for' or showing an 'interest in' separation when the underlying reason was weight control or physical fitness failure." *Id.* at 16a. Petitioners' construction thus would render the overweight/obesity/fitness category mere surplusage, applicable only in a set of cases that could not exist. Given the "anomalous" nature of that result, the courts reasonably read the reference to an "application" or expression of "interest" as relevant only to those categories for which an application or expression of interest could be made. See *id.* at 27a-28a; pp. 8-9, *supra*.

That result is consistent with the agency's longstanding practice and other indications of the agency's intent. The FMR was designed to incorporate the contents of the Korb memorandum—itself a binding directive—which did not condition recoupment on the service member's submission of an application where the separation resulted from failure to control weight or meet fitness requirements. (To the contrary, as noted above, service members could not submit an application for separation based on weight control or physical fitness failure, since the regulations did not provide for such applications.) The Military Pay and Allowance Committee (MPAC) thus explained that the "proposed

change incorporates the contents of the Assistant Secretary of Defense memorandum of 13 April 1983." C.A. App. 1395; see Pet. App. 15a. And the FMR bibliography cites the Korb memorandum as the authority for FMR 090403 (the former DoDPM 10942). Pet. App. 17a n.15; C.A. App. 1416. The clear intent of the FMR's drafters, therefore, was to reflect Assistant Secretary Korb's direction to recoup against those separated under the Convenience of the Government (obesity/physical fitness) category without requiring an application for discharge from the service member.[12] It was not error to construe the regulation in light of that drafting history.[13]

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[12] Admittedly, the FMR incorporated the Korb memorandum inartfully. C.A. App. 619-620. Apparently, when the FMR's drafters included weight or fitness failure under the convenience of the government category, they failed to strike the pre-existing language regarding the "application and interest" of the service member relevant to other convenience of the government discharges—*e.g.*, sole surviving family member. See Pet. App. 27a, 30a; C.A. App. 619-620, 1384-1387. At the same time, making the "application and interest" language applicable to the weight or fitness category would render that category pure surplusage. See pp. 8-9, 17-18, *supra*. Confronted with the resulting ambiguity, the courts below did not err in accepting the agency's construction, which was consistent with its longstanding practice.

[13] Petitioners repeatedly argue that the courts below erred in failing to recognize that the FMR expressly "superseded" all previous guidance. See Pet. 20; see also Pet. 5, 8. Because the FMR was also designed to incorporate those prior directives, however, it was permissible for the courts to consult them in construing the FMR, particularly given that the FMR *cited* the earlier Korb directive as the authority for its issuance. The courts below, moreover, did not expressly address petitioners' supersession argument, and petitioners did not timely raise that argument before the trial court. See Gov't C.A. Br. 31.

That result is likewise supported by the Jehn memorandum of March 1992, which created a new category of separation entitled "Weight Control Failure," Pet. App. 15a; C.A. App. 761, and likened separations under that category to those under the Drug or Alcohol Abuse Rehabilitation Failure categories—both of which result in recoupment under the Korb memorandum and FMR 090403 without any reference to a service member's application for separation. Pet. App. 29a; C.A. App. 619, 742.[14] Petitioners, moreover, ignore the introductory sentence to the FMR, which clarifies that its list of circumstances requiring recoupment is not exhaustive. The list of reasons for separation that trigger recoupment, it states, "includes (*but is not limited to*) members separated for the reasons listed below." FMR 090403 (emphasis added). Finally, while petitioners suggest (Pet. 8) that the Jehn memorandum's reference to treating weight control failure like drug and alcohol failure for "benefit" purposes precludes its application to bonus pay, military pay is considered one of the "benefits" associated with military service. See *Bowen* v. *United States*, 49 Fed. Cl. 673 (2001).[15]

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[14] The failure to incorporate the Jehn memorandum into FMR 090403 does not preclude recoupment against members separated under the Weight Control Failure category. The FMR expressly states that the list of categories it provides is not exclusive and, as the trial court found, "MPAC did not have the authority to 'reject'" such "directions and thereby establish agency recoupment policy." Pet. App. 17a n.15; see *id.* at 16a.

[15] Petitioners denigrate the Korb and Jehn directives as "secret." Pet. 1, 8, 18, 20. In reality, there is nothing secret about them, as evidenced by the references to the Korb memorandum in the FMRs. See Pet. App. 17a n.15. Those directives, moreover, are entitled to great weight (and had the force and effect of law within the military) even though not promulgated through notice-and-comment rulemaking. As the decision below explained, notice-

In any event, whether the FMR is ambiguous (as both courts concluded) or unambiguous (as petitioners contend) is not an issue of continuing importance. The Department of Defense has advised us that it plans to revise the FMR to clarify it and ensure that it clearly reflects the policies and constructions it was meant to embody. The proper interpretation of a soon-to-be superseded pay regulation is not the sort of issue that warrants this Court's review.

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and-comment was not required under the Administrative Procedure Act, 5 U.S.C. 551 *et seq.*, because the regulations and directives fall within the exception for "matters 'relating to agency management or personnel.'" Pet. App. 22a. Moreover, the regulations and directives exhibit the sort of formality and consideration that make them worthy of respect, since they "bound all the services to a single practice," *ibid.*; they were issued pursuant to an "explicit" delegation of "interpretive regulatory authority," *ibid.*; *id.* at 11a n.11; C.A. App. 1352, 1355, 1361-1363, 1371, 1376-1377; and they reflected the agency's consistent practice, Pet. App. 23a. See *EEOC* v. *Associated Dry Goods Corp.*, 449 U.S. 590, 600 n.17 (1981) ("contemporaneous construction" "deserves special deference when it has remained consistent over a long period of time"); see also, *e.g.*, *Udall* v. *Tallman*, 380 U.S. 1, 15 (1965) (applying same principle to interpretation of regulation).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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